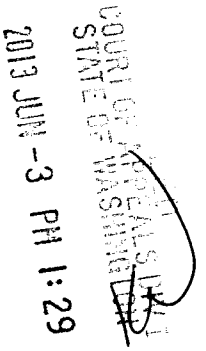
No. 68772-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
Petitioner,

v.

P. PARVIN AND L. BRAMLETT,
Respondents.



ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENTS

Suzanne Lee Elliott
Attorney for Respondents
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

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I.
REPLY STATEMENT OF THE ISSUE PRESENTED

Did Judge Kessler properly conclude that GR 15(c)(1) and CrR 3.1(f) set forth the proper procedure by which indigent parents may obtain ex parte orders for the appointment of experts in parental rights cases?

II.
REPLY STATEMENT OF FACTS

Respondents accept the DSHS's statement of the case with the following clarifications. It appears from the record in this case that many of the delays were occasioned by changes in counsel and at least one delay was due to DSHS's failure to provide the parents' counsel with discovery. 9/13/12 RP 16-17. It appears that counsel for the mother was not even assigned the case until July 9, 2012. 9/13/12 RP 16.

In addition to Judge Kessler's written ruling in this case, Judge Doerty said the following:

> In any case, situation where an indigent person is entitled to the right to representation of counsel at public expense, whether it's a constitutional provision that's derived of statute like it is in this proceeding or whether it's directly under the Sixth Amendment or whether it's a hybrid of the two, an example of which is the sexual predator commitment statute, the defense ought to have the same opportunity that a party, a defendant or respondent with money has, which is to go out and consult with forensic experts to see if a defense can be put together or if an opinion can be generated that would be useful to the defense.

> And they ought to be able to do that in the same way as paying parties, which is with confidentiality between the defense lawyer or the respondent's lawyer and the consulted expert.
>
> That's why the Superior Court generally, Judge Kessler in particular, and the Executive Committee, as a matter of policy believes that those OPD authorizations for expert services ought to be sealed. There's just no question at all if the respondent had money and they went out to talk to somebody about their case that the other side wouldn't get to know about that until the respondent was going to use the witness at trial. And, in that circumstance, the rules of discovery clearly apply.

9/13/12 RP 27-28.

Judge Doerty went on to note that although the defense had the right to seek expert funding ex parte, the defense still had the obligation to timely disclose the expert when it became clear the expert would be called to testify at trial. 9/13/12 RP 29. He said: "Once the defense goes out and gets the resources to hire the witness, it's up to the defense to crack the whip on the witness and get their work product done in time to conform to the rules." *Id.* at 30.

In this particular case Judge Doerty found that there was a "last minute disclosure of somebody who has certainly been in the mix for a really long period of time." As a result, he excluded the defense experts because they had not been timely disclosed. 9/13/12 RP 31.

III.
ARGUMENT

A. INTRODUCTION

This case would have progressed differently if the parents, Parvin and Bramlett,[1] were not poor. Even though the case had been set for trial, the parents could have used their own money to hire experts on January 11, 2012, February 2, 2012, March 10, 2012, and May, 2012. The Department would not have been entitled to notice that the parents had privately retained these experts. DSHS would not have had the right to come to court and argue that the parents were squandering their money and should be prohibited from doing so. DSHS would not have argued that because the parents spent their own money, they were placing the safety of their children in jeopardy. DSHS would not have argued that it was entitled to notice of strategic decisions made by the parents after consultation with counsel.

But because the parents are poor and are required to file a motion to ask the court for funds to hire experts, DSHS believes that it is entitled to notice of the parents' trial preparations and strategic decisions and an

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[1] Because the parents have different last names, for clarity's sake this brief will refer to them as "the parents."

opportunity to object to these decisions, in particular, the decision to seek expert opinions.

DSHS sought to capitalize on the fact that the parents are poor and asked the King County Superior Court to give DSHS an advantage it would not be entitled to in litigation against non-indigent parents. Judge Kessler properly refused to grant the Department's request. This Court should affirm Judge Kessler.

B. INDIGENT PARENTS IN WASHINGTON HAVE A RIGHT TO THE APPOINTMENT OF COUNSEL AT PUBLIC EXPENSE

It is well settled in Washington that the right to counsel attaches to indigent parents in termination proceedings by way of RCW 13.34.090(2). *In re Dependency of Grove*, 127 Wn.2d 221, 232, 897 P.2d 1252 (1995). This right derives from the due process guaranties of article I, § 3 of the Washington Constitution as well as the Fourteenth Amendment. *In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974). The right to the custody, control, and companionship of one's children is a fundamental right that the State may not abridge without the complete protection of due process. *Id.* at 136-37. "There can be no doubt that the full panoply of due process safeguards applies to deprivation hearings." *Id.* at 137; *In re Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P.2d 841 (1975).

There is also a statutory right to the appointment of counsel:

> At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.

RCW 13.34.090(2).

By statute also—not just in criminal proceedings, but in every case in which the right to counsel attaches—legal representation means effective representation, by definition.

> The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

RCW 10.101.005. *See In re Welfare of J.M.*, 130 Wn. App. 912, 922, 125 P.3d 245, 250 (2005).

C. THE RIGHT TO COUNSEL IS MEANINGLESS IF COUNSEL IS UNABLE TO OBTAIN THE SERVICES OF AN EXPERT AT PUBLIC EXPENSE

Our Supreme Court has also recognized, in the context of criminal cases, that "[t]he Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense." *State v.*

Punsalan, 156 Wn.2d 875, 878, 133 P.3d 934 (2006), citing *Ake v. Oklahoma*, 470 U.S. 68, 76, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (due process guarantees the defendant access to competent experts "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense").

DSHS does not quarrel with the notion that the right to the appointment of counsel in parental rights cases includes the right to have necessary experts appointed as well. DSHS does, however, argue that indigent parents and their lawyers are "squandering" public funds by making requests for experts. This argument will be address more fully below.

D. INDIGENT PARENTS HAVE THE RIGHT TO PREPARE THEIR DEFENSE WITHOUT THE INTERFERENCE BY DSHS

The United States Supreme Court has observed "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *See also United States v. Abreu*, 202 F.3d 386 (1st Cir. 2000) (federal law provides for ex parte proceedings when appointed counsel requests funding for experts "so as to 'prevent[ ] the possibility that an open hearing may cause a defendant to reveal his defense'" (citation omitted)); *Williams v. Texas*, 958 S.W.2d

186, 193 (Tex. Crim. App. 1997) (A defendant should not be "forced to choose between either forgoing the appointment of an expert or disclosing to the State in some detail his defensive theories or theories about weaknesses in the State's case").

Nothing in the civil rules, however, describes how a lawyer for an indigent parent in parental rights litigation should request funding for expert services necessary to the representation. DSHS argues that indigent parents must disclose to DSHS any request they make for the appointment of experts necessary to their defense. DSHS also argues that it has a right to be heard on such a request. But Judge Kessler and Judge Doerty correctly determined that, in the absence of any other relevant rules or caselaw, the Court should utilize the procedures in place for the category of cases most analogous – criminal prosecutions.

In criminal cases, CrR 3.1(f) incorporates the constitutional right of an indigent defendant to the assistance of expert witnesses and provides a procedure for seeking the rule provides that:

> (1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.
>
> (2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall

> authorize the services. The motion may be made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.
>
> (3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

Under GR 15(c)(1), motions made under CrR 3.1(f) may be made ex parte without notice to any other party.

DSHS argues that the trial court erred in applying the procedures in GR 15(c)(1) and CrR 3.1(f) to parental rights cases because 1) the state constitution requires that such requests be administered openly, 2) children are involved, 3) public funds are being wasted and 4) the orderly administration of justice is being adversely effected.

1. Judge Kessler's Decision Does Not Violate the State Constitution

It is true that the state constitution generally mandates open proceedings. But our Supreme Court has held that the public's right of access to the records of court proceedings may be limited to protect other significant and fundamental constitutional rights, such as a defendant's

right to a fair trial. *State v. McEnroe*, 174 Wn.2d 795, 279 P.3d 861 (2012); *State v. Mendez*, 157 Wn. App. 565, 585, 238 P.3d 517, 526 (2010), *review granted, cause remanded*, 172 Wn.2d 1004, 257 P.3d 1113 (2011). GR 15(c)(1) and CrR 3.1(f) have codified the balance for cases involving indigent criminal defendants who are entitled to the appointment of counsel at public expense. DSHS does not provide any persuasive argument why the balance between the open administration of justice and the indigent parents' constitutional rights would be different than the balance between the open administration of justice and the rights of indigent criminal defendants. The two situations are indistinguishable. In both cases, the State is threatening to deprive the indigent person of a fundamental constitutional right. In both situations, the indigent person is entitled to counsel and the ancillary services necessary to mount a defense to the State's actions. In both situations, the indigent person is entitled to prepare his or her defense without the unjustified interference of the State.

In light of these nearly identical situations, Judge Kessler correctly applied the GR 15(c)(1) and CrR 3.1(f) to the request for expert services in parental rights cases. Judge Kessler correctly concluded that the indigent parents' right to a fair trial would be jeopardized and DSHS would be given an unfair tactical advantage if indigent parents had to disclose their consulting expert's name and information to their adversaries. And, he

correctly concluded that indigent parents' right to counsel would be significantly diminished from that of financially secure parents who could afford to hire counsel and experts far from the prying eyes of DSHS.

As the Court of Appeals stated in *Mendez*, identifying the subject matter of an attorney/client conversation would present a privilege claim. *Id.* It is hard to imagine how a request for expert services would not reveal confidential attorney/client communications. For example, in this case, defense counsel sought funds for psychiatric services. Thus, defense counsel would have consulted with the parent and discussed the parent's mental health before seeking funding for the evaluator.

Moreover, Judge Kessler correctly concluded that for non-indigent parents, there is never a need to consider the application of Const. art. 1, § 10. That is because in non-indigent cases, the parents never have to bring a motion in order to hire the expert with whom they wish to consult. There is no court proceeding at all. They simply sign a retainer with the expert and proceed. In those cases the parents' lawyers never have to choose between hiring experts without having to reveal attorney/client communications and the attorney's protected thought processes or strategy to DSHS. These joint decisions between counsel and the parents are protected work product under CR 26(b)(5)(B). And, while it is true that sometimes consulting experts become testifying experts, in the pre-trial

preparation phase there is a distinct difference.[2] Consulting experts frequently are employed to assist defense counsel in the investigation of DSHS's case in addition to the exploration of available defenses. But, on many occasions, the consulting expert is never called to testify. DSHS is not entitled to discover the identities of nonwitness experts in any case, indigent or non-indigent. *See Detwiler v. Gall, Landau & Young Const. Co.*, 42 Wn. App. 567, 572, 712 P.2d 316 (1986).

2. Judge Kessler's Ruling Does Not Does Not Jeopardize the Right of the Children Involved in these Proceedings

DSHS does not fully explain why Judge Kessler's ruling jeopardizes the children involved by delaying the trial court proceedings.[3] CrR 3.1 has worked perfectly well in criminal cases. In criminal cases, the victims, like the children in dependency cases, are entitled to a speedy resolution. In fact, the application GR 15(c)(1)'s procedure for ex parte requests for funding for ancillary services to parental rights cases actually streamlines the process. DSHS appears to seek notice of the parent's

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[2] Nowhere in its brief does DSHS make a distinction between consulting experts and testifying experts.

[3] DSHS also argues that granting ex parte motions for the appointment of expert services to the parents "places children at risk of an ill-informed decision by the trial court." Petitioner's Brief at 2. It is unclear how providing funds to parents so that they can fully and fairly rebut DSHS's allegations would lead to an "ill-informed" decision. In fact, the risk of ill-informed decisions would only be increased if one party could *prevent* the other from developing relevant expert opinions. The more relevant information provided to the judge, the more "informed" his or her decision will be.

requests so that it can object and litigate the propriety of the expert services being requested and the amount that will be spent. Providing DSHS with the unjustified opportunity to interfere with funding for consulting as well as testifying experts will result in expensive, protracted pretrial litigation (and perhaps appellate proceedings) that will actually delay final resolution of the case. Stated another way, it is in everyone's best interest to insure that indigent parents have efficient access to the funds necessary to prepare their case for trial.

Moreover, not every case results in the termination of parental rights. It is in the children's best interests to have the trial court make fully informed decisions and to be returned to their parents if the parents are fit. Sometimes the only way for indigent parents to make their case is to hire experts. Thus, justice requires that indigent parents have efficient access to proper funding to prove that they are fit and that the children can be returned to them.

3. Judge Kessler's Decision Does Not Permit the Parents to Delay Trials, Squander Public Funds or Otherwise Violate the Rules for the Orderly Administration of Justice

As explained above, the application of GR 15(c)(1)'s procedure for ex parte requests for funding for ancillary services to parental rights cases actually streamlines procedures for indigent parents. When one cuts through the hyperbole, it appears that DSHS's real complaint is with tardy

disclosure of *testifying* expert witnesses. But nothing in Judge Kessler's ruling permits any party, rich or poor, to ignore the case schedule. The question of whether an expert should be appointed ex parte is completely separate from the question of whether defense counsel must comply with the civil rules for discovery and the applicable case schedule. Although DSHS seems to argue that the request for expert services is some sort of carefully orchestrated "bushwack" in indigent cases, it offers no proof of this allegation. Certainly, it is frustrating to have litigation delayed. But it appears from the record in this case that many of the delays were occasioned by changes in counsel.

Moreover, as evidenced by this case, defense counsel runs a grave risk if he or she does not request expert services early enough in the representation to comply with the case schedule and disclosure deadlines. Here, the experts were appointed but because they were disclosed too late, the trial court prohibited the defense from calling them. This demonstrates that the trial courts of this State have the means to prevent delay under the existing rules without compromising the indigent parent's ability to prepare their defense unhindered by interference by the opposing party.

DSHS suggests that the problem of delay occurs only with indigent parents. The Department argues that: "Although the affluent parent could theoretically hire and pay for an expert after the discovery cutoff, they are

not likely to do because of the financial loss they would having that expert excluded at trial." DSHS Opening brief at 26. First, respondents simply disagree. Most parents – rich or poor – would go to great lengths and spend all of their available resources to regain custody of their own children. Keeping one's family intact is overwhelmingly an emotional, not financial decision. The notion that parents first look at their budget and then decide whether or not to fight for the return of their children is not supported by fact or logic. Assessments by DSHS – an adversarial party – about what parents might do or spend in order to regain custody of their children is highly suspect and self-serving.

Finally, DSHS argues that indigent parents are "squandering" public funds. DSHS says that the King County Superior Court "fosters a system which public funds are authorized and wasted without accountability." DSHS Opening Brief at 1. DSHS provides no proof of these allegations, however. Apparently, DSHS believes that the Office of Public Defense and the superior court judges are either incompetent or negligent and therefore are improperly granting requests for expert services. But it is highly unlikely that the elected judges in this State are incapable of protecting public funds. Statewide, judges have been entrusted with that duty under GR 15(c)(1) and CrR 3.1(f) in criminal cases for years. In general, there have been no complaints that the judges

are incompetent or irresponsible in managing the limited public defense resources available to them in criminal cases. Thus, it seems unlikely that they cannot properly perform their duties in parental rights cases.

E. TO THE EXTENT THAT THERE IS A NEED TO FURTHER GUIDANCE ON APPLYING THESE WELL SETTLED PRINCIPLES TO PARENTAL RIGHTS CASES, DSHS SHOULD ASK THE SUPREME COURT TO ADOPT APPROPRIATE COURT RULES

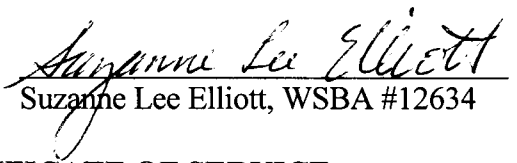
This Court should affirm Judge Kessler's written ruling in this case. That being said, it is true that there is no clearly applicable juvenile court rule that covers this situation. To the extent that DSHS believes that more clarification of the proper procedures for the appointment of experts for indigent parents is needed, it should suggest rules to the Supreme Court under GR 8, which permits any person to submit proposed rules and provides for a period of comment and consideration by all interested persons.

IV.
CONCLUSION

Judge Kessler and Judge Doerty did not err in concluding indigent parents can properly use the procedures in GR 15(c)(1) and CrR 3.1(f) when seeking funding for expert services in parental rights cases. This Court should affirm the decisions.

DATED this 31st day of May, 2013.

Respectfully submitted,



Suzanne Lee Elliott, WSBA #12634

CERTIFICATE OF SERVICE

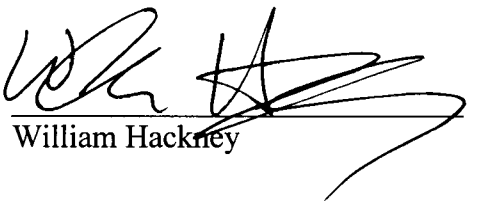
I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Ms. Trisha McArdle
Assistant Attorney General
800 Fifth Avenue, Suite 200
Seattle WA 98104-3188

And to:

Ms. Kathleen Martin
Ms. Kathryn Barnhouse
CASA
401 Fourth Avenue, Suite A2239
Kent, WA 98032-4429

5/31/13
Date



William Hackney